

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA



Keynote speech by

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on

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It is with great pleasure that I address this gathering of distinguished scholars. I am honoured by the kind invitation addressed to me on behalf of the organizers and grateful for the opportunity to exchange views with you on the work of the International Tribunal for the Law of the Sea.

I have chosen to speak today about the judicial work of the Tribunal. I will briefly describe that work with special emphasis on some of the procedural details of the new cases pending before it. I will also try to identify the reasons why the Tribunal has received more cases than any other court or tribunal referred to in article 287 of the Convention. Lastly, I will make some observations concerning prospects for the future work of the Tribunal and its role in implementation of the Convention's dispute settlement system.

Cases handled by the Tribunal

A great deal has been written and said about the Tribunal's shortage of cases. Although it could have entertained more cases than it has, the fact is that States have made greater use of the Tribunal than is commonly believed. Since 1998, when it received its first case, a total of 18 cases have been filed. Of these, 13 have been resolved, two were discontinued and the last three cases, instituted in the past 12 months, are under way.

Of the 13 cases that have been resolved, eight were prompt release cases,¹ four involved provisional measures² pending the constitution of an Annex VII arbitral tribunal and one dealt with compensation for the illegal arrest of vessel. The majority of these cases concerned prompt release of vessels and crews detained for alleged violation of coastal States' fisheries regulations in the exclusive economic zone. The Tribunal has developed a substantial *corpus* of jurisprudence in this regard.

The two discontinued cases were case No. 7 – *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* (Chile / the European Union) and Case No. 9 – *The "Chaisiri Reefer" 2 Case* (Panama v. Yemen), Prompt Release.

Case No. 7 was submitted to an *ad hoc* Special Chamber of the Tribunal formed under article 15, paragraph 2, of the Statute of the Tribunal; to date, this is the only contentious case that has been submitted to a chamber of the Tribunal. In March 2001, the parties informed the Special Chamber that they had reached a provisional arrangement concerning the dispute and requested that the proceedings before the Chamber be suspended. The time limits in the proceedings were therefore extended by

¹ The *M/V "Saiga"* case (Saint Vincent and the Grenadines v. Guinea); the *"Camouco"* case (Panama v. France); the *"Monte Confurco"* case (Seychelles v. France); the *"Grand Prince"* case (Belize v. France); the *"Volga"* case (Russian Federation v. Australia); the *"Juno Trader"* case (Saint Vincent and the Grenadines v. Guinea Bissau); the *"Hoshinmaru"* case (Japan v. Russian Federation); the *"Tomimaru"* case (Japan v. Russian Federation) .

² The *Bluefin Tuna* cases (Australia v. Japan; New Zealand v. Japan), the *MOX Plant* case (Ireland v. the United Kingdom) and the *Land Reclamation* case (Malaysia v. Singapore).

successive orders at the request of both parties. This case was ultimately discontinued in December 2009 at their request.

Although the Chamber did not deal with the substance of this case, the fact that it had been filed with the Tribunal may have helped the parties to reach an out of court agreement. As stated by the President of the Special Chamber, “[t]he Tribunal may assist the parties in more than one way. Adjudication is, of course, the main function of the Tribunal. It may also assist the parties, where appropriate, in reaching direct settlement of the dispute between them”.³

The “*Chaisiri Reefer 2*” prompt release case was also discontinued at the request of the parties as the detaining State had released the vessel, cargo and crew before the Tribunal could begin to deal with it.

The three new cases currently pending before the Tribunal are Case No. 16 – *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal*; Case No. 17 – a request for an advisory opinion concerning *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*; and Case No. 18 – *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Spain)*.

Case No. 16, on maritime delimitation

As I have mentioned, Case No. 16 relates to the dispute between the People’s Republic of Bangladesh and the Union of Myanmar concerning the delimitation of their maritime boundary in the Bay of Bengal.

By letter dated 13 December 2009, the Minister of Foreign Affairs of Bangladesh notified the President of the Tribunal of declarations issued, under article 287 of the Convention, by Myanmar on 4 November 2009 and by Bangladesh on 12 December 2009, in which both countries accepted the jurisdiction of the Tribunal as the forum for settlement of their maritime boundary dispute. In the same letter, the Minister of Foreign Affairs of Bangladesh invited the Tribunal to exercise jurisdiction over the dispute “[g]iven Bangladesh’s and Myanmar’s mutual consent to the jurisdiction of ITLOS”. Accordingly, the case was entered in the list of cases on 14 December 2009.

Subsequently, the President of the Tribunal held consultations with the representatives of the parties in order to ascertain their views on issues concerning the conduct of the case.

As a result of these consultations, the President set the time limits for presentation of the memorial and the counter-memorial. The Tribunal subsequently issued an order in which it set the time limits for the filing of the reply and the rejoinder. The written proceedings are now under way; Bangladesh submitted its memorial and Myanmar its counter-memorial on 1 July and 1 December 2010, respectively, as scheduled, and the

³ See the protocol of the session during which the order of discontinuance was read out.

written phase of the proceedings should conclude by 1 July 2011. Both parties have chosen judges *ad hoc* to sit in the case.

Case No. 17 – Request for an advisory opinion

In addition, in May 2010, the Tribunal's Seabed Disputes Chamber received a request for an advisory opinion from the International Seabed Authority. This case has been entered in the list as Case No. 17. The written and oral proceedings, in which a significant number of States parties and international organizations participated, have taken place. Twelve States and four international organizations made written submissions and, during the 3-day hearing held before the Seabed Disputes Chamber in Hamburg, eight States and three international organizations made oral presentations.

The Chamber is now deliberating on the case. Since, under the Convention, advisory opinions are to be given as a matter of urgency, a decision is expected in early 2011.

This request for an advisory opinion is a significant development in our work, since it is the first case brought before the Seabed Disputes Chamber, which, as the body with exclusive competence over seabed-related disputes and requests for advisory opinions on matters concerning the work of the Council and the Assembly of the International Seabed Authority, has enormous potential. As seabed activities increase, the disputes that may be brought before the Chamber will, in all likelihood, also increase.

Case No. 18 -The M/V "Louisa" Case

Saint Vincent and the Grenadines last week instituted proceedings before the Tribunal against Spain in a dispute concerning the *MV Louisa*, flying its flag, which allegedly was arrested on 1 February 2006 by the Spanish authorities and held since that date.

According to the Applicant, the *MV Louisa* was involved in conducting sonar and cesium magnetic surveys of the sea floor of the Bay of Cadiz in order to locate and record indications of oil and methane gas. The Applicant stated that the vessel was arrested for alleged violations of Spain's historical patrimony or marine environment laws, that various members of the crew were also arrested but have since been released and that the vessel is being held in Spain without bond. The Applicant maintained that the vessel was involved in scientific research with a valid permit from the coastal State. The Applicant claimed that Spain violated several articles of the Convention and requests the Tribunal to award compensation for damages caused.

The Application instituting these proceedings before the Tribunal includes a request for provisional measures under article 290, paragraph 1, of the Convention.

Hearings on the request for provisional measures are to take place on the 10th and 11th of the current month.

Both Saint Vincent and the Grenadines and Spain have made declarations under article 287 of the Convention, recognizing the competence of the Tribunal as a means for the settlement of disputes concerning the interpretation or application of the Convention.

Based on an analysis of the cases that have come before the Tribunal, the following observations may be made:

- (a) The Tribunal has received 18 cases in 14 years, which is undoubtedly a good record, especially in light of the fact that it is a new institution and that, as a specialized court, it has limited jurisdiction *ratione materiae* for dealing only with disputes related to the law of the sea;
- (b) These cases have involved both developed and developing countries from all regions of the world as disputant States; this shows that recourse to the Tribunal is a global trend rather than a regional proclivity;
- (c) The cases submitted to the Tribunal have covered a wide range of law of the sea issues, such as protection of the marine environment, conservation of marine living resources, prompt release of vessels and crews, delimitation of maritime boundaries, compensation for illegal detention of vessels, and the responsibility and liability of sponsoring States. This confirms that this Tribunal is really the tribunal for the law of the sea;
- (d) Since it began its work in 1996, the Tribunal has received the highest number of cases of all the courts and tribunals listed in article 287 of the Convention. This last point raises the question of why the Tribunal has received, during the same period, far more law of the sea related cases than the other dispute settlement mechanisms listed in article 287.

Article 287 of the Convention

As you know, the Tribunal is one of four law of the sea dispute settlement mechanisms listed in article 287 of the Convention. The parties to a dispute are in principle free to select any of these mechanisms. Though this article does not accord the Tribunal any special treatment as compared to the other dispute settlement mechanisms, I believe that the Tribunal is nonetheless accorded a relatively better position in this regard by certain provisions of the Convention.

This may come as a surprise to some people, for it is often stated that the Convention does not accord the Tribunal preferential treatment in relation to the other means of dispute settlement listed in article 287. This is true as a general statement for, of the four listed mechanisms, article 287 gives a prominent position only to Annex VII arbitration by granting it special status as the default procedure. If the parties to a law of the sea dispute have not made a common decision to choose the same mechanism as the forum for the settlement of their dispute, then one of them may, under compulsory

jurisdiction, institute an Annex VII arbitration against the other, without prejudice of the exceptions set out in the Convention.⁴

While the Convention does not grant the Tribunal the privilege of being the default procedure, some of its provisions however accord it more favourable treatment in at least, four circumstances. This may account for the fact that the Tribunal has received 18 cases in a relatively short period of time and may also explain why it has received, in the same period, more cases than the other courts or tribunals referred to in article 287.

These four circumstances are: the exclusive jurisdiction of the Tribunal's Seabed Disputes Chamber regarding disputes and requests for advisory opinions related to the international seabed regime;⁵ the residual jurisdiction of the Tribunal in prompt release cases⁶; the special and unique jurisdiction, conferred on the Tribunal by the Convention, to entertain requests for provisional measures pending the constitution of an arbitral tribunal under Annex VII of the Convention;⁷ and the authority, granted to the President of the Tribunal by Annex VII, to appoint arbitrators to an arbitral tribunal at the request of a party and in consultation with both parties.⁸

Exclusive jurisdiction of the Tribunal's Seabed Disputes Chamber

The Convention recognizes the exclusive jurisdiction of the Tribunal's Seabed Disputes Chamber to entertain both disputes arising out of interpretation or application of the provisions of the Convention concerning activities in the Area, and requests for advisory opinions made by the Assembly or the Council of the Authority "on legal questions arising within the scope of their activities".⁹ Thus, the framers of the Convention granted preferential treatment to the Tribunal, since none of the other "means of dispute settlement" referred to in article 287 of the Convention has jurisdiction to deal with such disputes¹⁰ or requests. There are, however, two narrow exceptions to this rule: first, the parties to a dispute between States concerning the interpretation or application of Part XI of the Convention and related annexes may choose a chamber of the Tribunal or refer the dispute to a 3-member *ad hoc* chamber of the Seabed Disputes Chamber itself;¹¹ and, second, a party to a dispute concerning a contract or a plan of work may request that it be submitted to binding commercial arbitration.

⁴ See articles 297 and 298 of the United Nations Convention on the Law of the Sea.

⁵ *Ibid.*, arts. 187 and 191.

⁶ *Ibid.*, art. 292, para. 1.

⁷ *Ibid.*, art. 290, para. 5.

⁸ *Ibid.*, Annex VII, art. 3.

⁹ See art. 191 of the Convention.

¹⁰ See Carl-August Fleischhauer, "The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg," *Max Planck Yearbook of United Nations Law*, vol. 1 (1997), p 332. See also Dame Rosalyn Higgins' statement at the tenth anniversary of the International Tribunal for the Law of the Sea.

¹¹ Art. 188, para. 1 (a), of the Convention.

Thus, a whole set of potential disputes concerning an important Part of the Convention is reserved for the Seabed Disputes Chamber's adjudication. Recently, this special treatment made it possible for Case No. 17 to be filed with the Chamber.

Prompt release of vessels and crews

The Convention confers on the Tribunal residual jurisdiction to entertain cases of prompt release of vessels from detention either for alleged non-compliance with laws and regulations concerning living resources in the exclusive economic zone that have been adopted by the coastal State in conformity with the Convention,¹² or for pollution of the marine environment.¹³ Other courts and tribunals referred to in article 287 may exercise jurisdiction in cases of prompt release of vessels and crews on the basis of an agreement between the parties. If, however, as is usually the case, no such agreement is reached within 10 days of the detention of the vessel, the flag State may institute the case before a court or tribunal accepted by the detaining State under article 287 or, on a compulsory basis, before the Tribunal.¹⁴ This residual jurisdiction gives the Tribunal an edge over other courts or tribunals referred to in article 287. The flag State has thus the option of bringing a prompt release case before the Tribunal 10 days after the detention of the vessel, irrespective of whether the detaining State agrees with the choice of the Tribunal as the forum to entertain the prompt release case.

As a result of this residual jurisdiction, the Tribunal has received 9 cases of prompt release of vessels and crews from detention for alleged violation of fisheries regulations in the exclusive economic zone. All these cases were introduced by the flag State, or on its behalf, on the basis of compulsory jurisdiction. No such cases have been instituted before the other courts and tribunals referred to in article 287 of the Convention.

Provisional measures pending the constitution of an Annex VII arbitral tribunal

Provisional measures pending the constitution of an Annex VII arbitral tribunal is another example of preferential treatment accorded to the Tribunal by the Convention.¹⁵ This procedure is an innovation in international adjudication; it allows a party to a case that has been instituted before an arbitral tribunal under Annex VII of the Convention to file for interim measures before the Tribunal, pending the constitution of the arbitral tribunal.

The request for provisional measures may also be made to any court or tribunal referred to in article 287 on the basis of an agreement between the two parties to the dispute. If no such agreement is reached, either party may introduce the request for provisional measures to the Tribunal (and only to the Tribunal) two weeks after it has notified the

¹² Ibid., art. 73, para. 1.

¹³ Ibid., arts. 220, para. 7, and 226, paras 1 (b) and (c).

¹⁴ Ibid., art. 292, para. 1.

¹⁵ Ibid., art. 290, para. 5.

other party of the request. Thus, the Tribunal is the default procedure if the parties do not agree on a settlement mechanism.¹⁶

This special treatment explains why the Tribunal, and no other court or tribunal listed in article 287, has received four such cases. The *Bluefin Tuna* cases, the *MOX Plant* case and the *Land Reclamation* case were all instituted before the Tribunal under this provision entailing compulsory jurisdiction.

Annex VII special authority

Another situation that may facilitate the institution of a case before the Tribunal has to do with the role granted to its President by Annex VII to the Convention.

Under Annex VII arbitration, the parties are to appoint three arbitrators and the President of the arbitral tribunal by agreement. If, within 60 days from the notification of institution of arbitral proceedings, they cannot agree on these appointments or on an entity to make them, either party may request the President of the Tribunal to do so¹⁷ in consultation with the two parties.

This recourse to the President brings the parties to Annex VII arbitration closer to the Tribunal. In some instances, as a result of contacts made in the context of the appointment of arbitrators, the parties may end up shifting the case from arbitration to the Tribunal. Financial considerations may play a major role in this regard; the costs of arbitration are not negligible and can be substantially reduced if the case is transferred to the Tribunal.

Moreover, States parties to a dispute, after years of consultations and negotiations, are sometimes left with no alternative other than to institute Annex VII arbitral proceedings (for which the instituting party does not require the agreement of the other disputant party), as a first step towards possible referral of the dispute to another third party procedure. Once Annex VII arbitration has been instituted, considerations of costs reduction and time effectiveness may lead the parties into agreeing to refer the case to the Tribunal.

On three occasions, cases that were initially brought to Annex VII arbitration were later shifted to the Tribunal by agreement of the parties: This happened in the “*Saiga*” 2 case, in the *Swordfish Stocks* case and in the case concerning the *Delimitation of the maritime boundary case in the Bay of Bengal*, now pending before us.

Prospects for the future work of the Tribunal

What are the prospects for the future judicial work of the Tribunal? The Tribunal is a new judicial institution that received its first case in 1998. Since then, it has been building its docket, case by case. Its pace has been comparable to that of other

¹⁶ Ibid., art. 290, para. 5.

¹⁷ Ibid., Annex VII, art. 3.

international courts in the early years of their work; as Judge Higgins put it, “[t]he experience of most international courts is to start slowly and steadily build their docket”.¹⁸

Two important factors may condition the number of cases that the Tribunal receives in the future. The first has to do with the very slow progress of activities in the Area, as a result of which only one seabed-related case has been instituted to date. This is nonetheless an encouraging development for the Tribunal. The more exploration and exploitation activities take place in the Area, the likelier it is that disputes which can be brought only before the Seabed Disputes Chamber will arise.

The second factor has to do with familiarity with the Convention’s dispute settlement system and the corresponding procedures of the Tribunal. The dispute settlement provisions of the Convention are not easily understood, and our procedures seem to reflect that uneasiness. Aware of this, the Tribunal has taken a number of initiatives to disseminate information on its work; we have prepared a guide to our procedures and have organized eight regional workshops for government legal officers. In addition, some of the Tribunal’s judges have written a commentary to our Rules. It appears, however, that we need to do a better job in this regard.

As States become more involved with the law of the sea dispute settlement system established by the Convention and more familiar with our procedures and methods of work, the likelihood that more cases will be instituted with the Tribunal will increase. Judging from the number of cases that we have received thus far, the built-in preferential treatment granted to the Tribunal by the Convention, the prospect of increased seabed activities in the near future and the potential for increased numbers of disputes as the use of the oceans and the exploitation of its resources increase substantially to keep pace with development needs, there are solid prospects for our docket to grow much stronger. This makes me believe that the Tribunal is well positioned to be a very busy court in the near future and that it may therefore be able to play a major role in global ocean governance.

As intended by the framers of the Convention, “We are seeing the development of a multifaceted system for the settlement of law of the sea-related disputes with ITLOS as an important player”.¹⁹ I have no doubt that as time goes by and ocean uses increase exponentially, the Tribunal will be well placed to continue to play the “important role and authority ...concerning the interpretation and application of the Convention and Part XI Agreement” that is stressed in the General Assembly’s 2010 resolution on oceans and the law of the sea.²⁰

I thank you for your attention.

¹⁸ Statement by Dame Rosalyn Higgins, President of the International Court of Justice, on the occasion of the tenth anniversary of the Tribunal.

¹⁹ See footnote 18 above.

²⁰ A/Res/64/71, para. 29.